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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT HENRY KING,

Defendant and Appellant.

F072979

(Super. Ct. No. BF148455A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Steven M. Katz, Judge.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, and John W. Powell, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Albert Henry King was convicted by jury of attempted robbery, aggravated assault, and unlawful possession of a firearm. This appeal involves allegations of racial discrimination during the jury selection process. There are also

sentencing issues concerning the applicability of Penal Code section 654 and Senate Bill No. 620 (2017–2018 Reg. Sess.) (Senate Bill 620). Additional claims of insufficient evidence with regard to certain firearm offenses and gang findings are conceded by the People. We affirm in part, reverse in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with attempted second degree robbery of G.C. (victim #1) (Pen. Code,[1] §§ 211, 212.5, subd. (c), 664; count 1); assault with a semiautomatic firearm against victim #1 (§ 245, subd. (b); count 2); assault with a semiautomatic firearm against J.C. (victim #2) (§ 245, subd. (b); count 3); possession of a firearm by a convicted felon on two separate occasions (§ 29800, subd. (a)(1); counts 4 & 5); and carrying a loaded firearm in public as an active gang member (§ 25850, subd. (c)(3); count 6). Counts 1–4 included enhancements for personal use of a firearm. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) Counts 4–5 were alleged to be gang related within the meaning of section 186.22, subdivision (b)(1). Defendant was further alleged to have suffered two prior strike convictions (§§ 667, subds. (c)–(j), 1170.12, subds. (a)–(e)) and to have served two prior prison terms (§ 667.5, subd. (b)).

Count 6 and the gang enhancement allegations were bifurcated from the other charges. A two-part jury trial was held from April 7, 2015, through May 5, 2015. The recidivism enhancement allegations were determined in a separate bench trial. Facts surrounding the jury selection issue are summarized in our Discussion, *post*.

Trial Evidence

On May 1, 2013, defendant attempted to rob victim #1 outside his place of employment. Defendant brandished a firearm, demanded the victim's wallet, and tried to forcibly remove the wallet from the victim's pants pocket. Attempting to defend himself, the victim grabbed the barrel of the gun.

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[1] All further statutory references are to the Penal Code.

The victim's boss, victim #2, exited his shop and saw the two men struggling for control of the weapon. Upon seeing victim #2, defendant pointed the gun at him and fired a shot, which missed.[2] Next, victim #1 ran toward the building and defendant fired two more shots in the general direction of both victims. Defendant then fled, and the victims called 911. Police recovered three expended cartridge casings at the crime scene.

Nine days later, a police officer found defendant sleeping inside of a car parked in a grassy area behind a dumpster. The officer conducted a welfare check, during which defendant falsely identified himself. The vehicle was impounded and searched, which yielded a loaded semiautomatic handgun. Ballistics testing matched this firearm to the three casings found at the earlier crime scene. Following his arrest, the victims identified defendant from photographic lineups. The victims positively identified him as the perpetrator again at trial.

The parties stipulated to defendant's status as a previously convicted felon. According to the arresting officer, defendant had denied ownership of the handgun but admitted carrying it for protection because he was a gang member. Other police officers testified to having heard him make similar admissions of gang membership in the past. An expert witness opined defendant was an active member of a local Bakersfield gang called the East Side Crips.

Verdicts and Sentencing

Defendant was convicted as charged and all allegations were found true except for the gang enhancement relating to count 4. The jury hung on the question of whether possession of a firearm during the assaults and attempted robbery had been for gang-related purposes. The allegation was ultimately dismissed at the People's request.

[2]The testimony on this point is imprecise. Like all of the evidence, it is summarized in the light most favorable to the judgment.

The trial court imposed an aggregate prison term of 108 years to life, plus 70 years, pursuant to these calculations: as to count 1, 25 years to life plus a consecutive 10-year term for the firearm enhancement and two consecutive five-year terms for prior serious felony convictions (§ 667, subd. (a)(1)); as to counts 2 and 3, consecutive terms of 29 years to life plus an additional 20 years on each count for the same enhancements; as to count 4, a stayed six-year term (§ 654); as to count 5, 25 years to life plus two consecutive five-year terms for prior serious felony convictions; and, as to count 6, a stayed term of three years.

DISCUSSION

I. Jury Selection

Defendant is identified in the record as African-American. During voir dire, he objected to the prosecutor's use of a peremptory challenge to remove one of approximately three purportedly African-American members of the venire. We say "purportedly" because the trial judge was unsure whether the prospective juror was, in fact, African-American. Regardless, we conclude the objection was properly overruled pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) for failure to demonstrate a prima facie case of group bias.

A. Pertinent Background

The venire consisted of 80 prospective jurors, which defense counsel described as "heav[ily] representative of Hispanics." Following hardship excusals, voir dire began with 18 individuals. This group consisted of people from at least three or four different ethnic and racial backgrounds, including B.J. For purposes of this discussion, we assume B.J. is African-American. She described herself as single, with no children, and worked as "a server in a restaurant."

B.J. spoke once during the initial round of questioning by the trial judge, replying "no" when asked if she had any questions or responses regarding the matters being discussed. Later, in an exchange with defense counsel, she stated an intention to "go back" to school in approximately two months. Defense counsel inquired, "Do you want to be on this jury?" She answered, "Not particularly," and subsequently explained: "The only reason I would really have is it would be more of an inconvenience for my work schedule. But that's about it."

The prosecutor questioned B.J. on two occasions. One line of inquiry concerned her thoughts on the probative value of different types of evidence. The other exchange was as follows:

> "[PROSECUTOR:] How are you?
>
> "[B.J.:] I'm all right.
>
> "[PROSECUTOR:] Okay. You're not really enjoying this process[?]
>
> "[B.J.:] It's fine.
>
> "[PROSECUTOR:] Okay. Just bear with us just through this. It's a necessary part. [¶] You said that you're going to start taking classes again in the summertime?
>
> "[B.J.:] Yes.
>
> "[PROSECUTOR:] And just general ed.?
>
> "[B.J.:] Yes.
>
> "[PROSECUTOR:] Have you been away from school for a time?
>
> "[B.J.:] Yes.
>
> "[PROSECUTOR:] Okay. And do you have anything in mind as far as a career that you would like to pursue for your education? Or is it just, sort of, well-roundedness?
>
> "[B.J.:] Yeah, nothing in particular. [¶] … [¶]

"[PROSECUTOR:] If you were empaneled on this jury, and you go into the back and you start deliberations, will you let your perspective be heard?

"[B.J.:] Yes.

"[PROSECUTOR:] It's a difficult thing to do to both let your perspective be heard and listen to other people. [¶] Would you agree with that?

"[B.J.:] Yes.

"[PROSECUTOR:] Are you able to do that?

"[B.J.:] Yes."

The prosecutor used his third peremptory challenge to excuse B.J. Defense counsel made a *Batson*/*Wheeler* objection, noting B.J. was the only African-American individual in the 12-person jury box at the time of the challenge. Counsel added, "[N]obody challenged her for cause, including the People. And I can recall no answers that would logically provide a legitimate reason for her dismissal." The prosecutor disputed the existence of a prima facie case: "It's one person at the very outset of the jury selection process. It's—I've used three strikes; that is to say, peremptory challenges. I believe she's the only woman. They've been each of three different races."

Citing "the totality of the circumstances," the trial court overruled the objection for lack of a prima facie showing of group bias. When defense counsel continued to protest, the trial court asked the prosecutor to state, "[f]or the sake of argument," his reasons for excusing B.J. The prosecutor replied:

"My reasons for exercising the peremptory challenge [against B.J.] is because she—first of all, she said she didn't want to be a juror. She didn't want to take part in this. Her answers were that she is not currently in school. And she's working as a server in a restaurant. There's no problem with that. That's fine. Some people can be doing that; because they want to learn the trade. People can be doing that; because they're in between jobs. People can be doing that; because they love helping people and meeting people. That's fine. But that, taken with her educational position—the questions she answered about her educational position, being

> that she's going to go back, probably; that she's going to go into general ed; she doesn't know what she wants to do. I was left with the sense that she's—she's probably not in the right mental frame to deal with something of the gravity of this; that she's—she's sort of uncertain about her own life. And we need as much of an effort as possible of certainty in this process, Your Honor. She was very quiet. She wasn't forthcoming. She didn't seem to be engaging like other jurors were. In fact, she sat back with her arms folded for almost every second she was here. For those reasons, I thought she would be a bad fit with this jury. And I exercised my peremptory challenge."

After further argument by defense counsel, the trial court reaffirmed its ruling. The court noted that, although "he didn't have to," the prosecutor had articulated "race-neutral reasons for her exclusion." The judge continued, "I will point out, [defense counsel], in our discussions off the record, you are the one who told me—I think you even questioned her on the record about her being bored or her not paying attention, her not looking at the board. So I'm not putting that on you. I'm just saying we—we have excused other jurors when they have articulated that they don't seem to be interested in being here."

B. Analysis

The United States and California Constitutions prohibit the use of peremptory challenges to strike prospective jurors on the basis of race or ethnicity. (*People v. Avila* (2006) 38 Cal.4th 491, 541, citing *Batson*, *supra*, 476 U.S. at p. 88; *Wheeler*, *supra*, 22 Cal.3d at pp. 276–277.) A three-step procedure is used to evaluate allegations of such discrimination.

> "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination.'" (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)

We review the trial court's ruling for substantial evidence. (*People v. Salcido* (2008) 44 Cal.4th 93, 136.) The framework is articulated in *People v. Scott* (2015) 61 Cal.4th 363:

> "[W]here (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson*/*Wheeler* motion with a review of the first-stage ruling. [Citations.] If the appellate court agrees with the trial court's first-stage ruling, the claim is resolved." (*Id.* at p. 391, fn. omitted.)[3]

Contrary to defense counsel's argument, which defendant repeats on appeal, a prima facie case did not arise simply because the People dismissed one of only two or three African-American prospective jurors. A reasonable inference of discrimination requires more than the prospective juror's membership in a cognizable group that is underrepresented in the jury pool. As stated in *People v. Harris* (2013) 57 Cal.4th 804, where a prosecutor dismissed the only two African-American women who had been called to the jury box, "the small number of African-Americans in the jury pool makes 'drawing an inference of discrimination from this fact alone impossible.'" (*Id.* at p. 835.) Similarly, in *People v. Edwards* (2013) 57 Cal.4th 658, the defendant attempted to establish a prima facie case by arguing "there appeared to be only one other Black prospective juror" besides the person who was peremptorily challenged. (*Id.* at p. 698, fn. omitted.) This was held to be "insufficient." (*Ibid.*) The same was true in *People v.*

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[3]Defendant's opening brief focuses on the second and third stages of the analysis, all but ignoring the question of whether a prima facie case of discrimination was made below. The People aptly note the holding of *Scott*, which is controlling. In his reply, defendant directs our attention to the concurring opinion of Justice Liu, wherein he disagreed with the majority's approach in terms of analyzing the first-stage ruling. (*People v. Scott*, *supra*, 61 Cal.4th at p. 409.) Obviously, we are bound by the majority opinions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Estate of Pittman* (1998) 63 Cal.App.4th 290, 300.)

Clark (2011) 52 Cal.4th 856, 905, where the prosecutor challenged four out of five African-American members of the jury pool. Another example is *People v. Bell* (2007) 40 Cal.4th 582, which involved the use of peremptory challenges to exclude two of only three African-American prospective jurors. (*Id*. at pp. 597–598.)

Although the dismissal of some or all members of a cognizable group is relevant to the *Batson*/*Wheeler* analysis, other probative circumstances must exist. Relevant considerations may include the nature of the questioning by the prosecutor, the racial or ethnic background of the defendant and the victim, and the similarity of challenged jurors based on characteristics other than group membership. (*People v. Harris*, *supra*, 57 Cal.4th at pp. 834–835.) Evidence of "desultory voir dire" or no questioning at all may suggest a discriminatory motive. (*Id*. at p. 835.) None of these factors supports the existence of a prima facie case in this matter.

The prosecutor questioned approximately 14 of the initial 18 prospective jurors, including B.J., and the questioning of B.J. was not outwardly artificial or desultory. Both victims were Hispanic, but the prosecutor's challenges did not appear designed to achieve any particular racial or ethnic composition. The first three peremptory challenges were reportedly exercised against people of "three different races." As with B.J., the others who were peremptorily challenged had been questioned about their employment, general direction in life, ability to remain focused on the case, and/or their ability to be an equal participant in the deliberation process. Furthermore, B.J. was replaced by an African-American man who ultimately served on the jury. (Accord, *People v. Clark*, *supra*, 52 Cal.4th at p. 906 ["Although the circumstance that the jury included a member of the identified group is not dispositive [citation], 'it is an indication of good faith in exercising peremptories …' and an appropriate factor to consider in assessing a *Wheeler*/*Batson* motion"].)

The only other argument for a prima facie case was defense counsel's opinion that B.J. had given "no answers that would logically provide a legitimate reason for her

dismissal." Subjective viewpoints of the party asserting the *Batson*/*Wheeler* objection carry little weight. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 76 [defense counsel's favorable opinion of challenged prospective jurors constituted a "meager" and insufficient showing of group bias].) Both sides have the right to excuse a prospective juror "based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) "On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." (*Id*. at p. 622.) According to the record, even defense counsel had been concerned with B.J.'s level of engagement during voir dire. Aloofness and apparent disinterest in the proceedings are legitimate, race-neutral reasons for excusing a prospective juror. (*People v. Hensley* (2014) 59 Cal.4th 788, 803 ["Rigid jurors who appear emotionally detached and terse may be divisive during deliberations. They may not perform [as] well as open-minded jurors willing and able to articulate their views and persuade others"]; *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 ["the prosecutor may strike potential jurors for their passivity, inattentiveness or inability to relate to other jurors"].)

In summary, the totality of the relevant facts does not give rise to an inference of racial discrimination. We therefore agree with the trial court's findings at the first stage of the *Batson*/*Wheeler* analysis. In light of this conclusion, it is unnecessary to further analyze the stated reasons for the peremptory challenge. (*People v. Scott*, *supra*, 61 Cal.4th at p. 391.)

II. Count 5

Count 4 was based on defendant's possession of a firearm on May 1, 2013. As demonstrated by the evidence linking the bullet casings recovered at the first crime scene

to the gun seized at the time of defendant's arrest, count 5 was based on his possession of the same firearm on May 10, 2013. Defendant thus argues, and the People concede, count 5 must be reversed.

The parties rely on *People v. Mason* (2014) 232 Cal.App.4th 355, which explains that possession of a firearm by a felon is a continuing offense. (*Id*. at pp. 364–365 [analyzing former § 12021, subd. (a)(1), the predecessor statute to § 29800].) "'Ordinarily, a continuing offense is marked by a continuing duty in the defendant to do an act which he fails to do. The offense continues as long as the duty persists, and there is a failure to perform that duty.' [Citations.] Thus, when the law imposes an affirmative obligation to act, the violation is *complete* at the first instance the elements are met. It is nevertheless not *completed* as long as the obligation remains unfulfilled. 'The crime achieves no finality until such time.'" (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 525–526.) In other words, "'only one violation occurs even though the proscribed conduct may extend over [an] indefinite period.'" (*People v. Mason*, *supra*, at p. 365.)

As in *Mason*, defendant possessed the same gun on different days and "there was no evidence that [his] possession of the firearm was anything but continuous over the period encompassing [those] dates." (*People v. Mason*, *supra*, 232 Cal.App.4th at p. 366.) This means the record does not support separate convictions for his violation of section 29800, subdivision (a)(1). Therefore, we accept the People's concession and reverse the conviction on count 5.

III. Count 6

Carrying a loaded firearm "on the person or in a vehicle while in any public place" is a misdemeanor. (§ 25850, subds. (a), (c)(7).) The crime is punishable as a felony "[w]here the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22." (§ 25850, subd. (c)(3).) Defendant contends, and the

People agree, his conviction for the latter offense must be reversed due to the solitary nature of his actions.

Section 186.22, subdivision (a) proscribes active participation in a criminal street gang. The offense has three elements:

> "First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.)

The legislative intent behind section 186.22, subdivision (a) was "to punish gang members who acted *in concert* with other gang members in committing a felony." (*Rodriguez*, at p. 1138.) Therefore, active participation in a criminal street gang "requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member." (*Id*. at p. 1132.)

To elevate a section 25850 firearm offense to a felony based on the defendant's gang membership, each element of section 186.22, subdivision (a), must be proven. (*People v. Infante* (2014) 58 Cal.4th 688, 691–692.) In this case, defendant acted alone. Since the People failed to show felonious conduct committed by at least two gang members, defendant's act of carrying a loaded firearm in public is punishable only as a misdemeanor. (§ 25850, subd. (c)(7).) Accordingly, the count 6 conviction shall be reduced to a misdemeanor violation of section 25850, subdivision (a).

IV. Sentencing Issues

A. Section 654

Defendant contends the trial court erred by imposing consecutive sentences for counts 1 and 2, i.e., attempted robbery and aggravated assault against victim #1, instead of staying punishment for count 2 pursuant to section 654. He argues the crimes were committed with a single objective and as part of an indivisible course of conduct.

Specifically, he claims to have shot at victim #1 only "in an effort to thwart [the victim's] resistance to being robbed."

Section 654 prohibits multiple punishment for crimes arising out of a single act or indivisible course of conduct. (*Id.*, subd. (a); *People v. Hester* (2000) 22 Cal.4th 290, 294.) The defendant's intent and objective determine whether two crimes are part of an indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) In the absence of separate and distinct objectives, it is error to impose consecutive or concurrent sentences instead of staying the execution of sentence for those convictions to which section 654 applies. Such errors are reviewable on appeal regardless of whether an objection was made at the time of sentencing. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

As a general rule, the trial court determines the defendant's intentions and objectives by a preponderance of the evidence. (Accord, *People v. Towne* (2008) 44 Cal.4th 63, 86 ["Facts relevant to sentencing need be proved only by a preponderance of the evidence"]; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268-270.) "When a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective." (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) "We review the court's determination … for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]" (*Cleveland*, *supra*, at p. 271.)

The People rely on *People v. Nguyen* (1988) 204 Cal.App.3d 181, which holds "that a separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*Id.* at p. 193.) This principle has also been applied in the context of attempted robbery. (*People v. Sandoval* (1994) 30 Cal.App.4th

1288, 1299–1300.) Defendant acknowledges these authorities, but argues his case is factually distinguishable.

In *Sandoval*, the defendant demanded money at gunpoint from a convenience store clerk. The clerk began to comply but then stopped and tried to reason with the defendant. The defendant reacted by shooting the clerk and leaving the store without any further attempt to obtain the money. The trial court imposed consecutive terms for attempted robbery and attempted murder. (*People v. Sandoval*, *supra*, 30 Cal.App.4th at pp. 1295–1296, 1299.) On appeal, the defendant argued his sentence violated section 654 because both offenses arose from one indivisible course of conduct, and he had acted with the lone objective of obtaining money. The appellate court rejected this argument, viewing the attempted murder as a gratuitous act of violence and noting the crime of attempted robbery was complete when the clerk refused to hand over the money. (*Id*. at p. 1299.) "It was only *after* this that [the defendant], from point blank range, determined for his own purposes to punish [the clerk], or to assuage his own thwarted desires by seeking other and different gratification, by firing directly into [the clerk's] chest." (*Id*. at pp. 1299–1300.)

Here, defendant aimed his gun at victim #2 before firing the first of three shots. Victim #1 testified he "pulled the gun up" as defendant pulled the trigger, which caused the gun to fire into the air. Victim #1 was asked, "What happened after the defendant shot that one round?" He testified, "I left him. I [let go of] the gun. I was standing for some moments in front of him … [¶] … [¶] [and then] I ran." In a followup question, the prosecutor asked, "What happened as you turned to run?" Victim #1 replied, "When I was running, he fired two more shots." The testimony of victim #2 was generally consistent with this sequence of events, but at one point he claimed victim #1 did not start running until "after the second shot." However, victim #2's testimony indicated one or both of the final two shots were fired as defendant was fleeing the scene.

Viewed in the light most favorable to the judgment, the victims' testimony does not support defendant's claim of shooting at victim #1 "in an effort to thwart [the victim's] resistance to being robbed." Victim #1 testified he had his back to defendant and was running when the second and third shots were fired. Victim #2's testimony indicated defendant and victim #1 were moving in opposite directions, at least when the third shot was fired. The trial court could have reasonably inferred the shooting was not done in an effort to obtain victim #1's wallet, but was instead motivated by spite, vengefulness, or some similar objective independent of the intent to commit robbery. Since there is substantial evidence to support the implied finding of separate intentions and/or objectives, the trial court did not err by failing to stay punishment on count 2.

B. Senate Bill 620

On October 11, 2017, the Governor approved Senate Bill 620, which amended sections 12022.5 and 12022.53. The legislation went into effect on January 1, 2018. (Stats. 2017, ch. 682, § 2.) Pursuant to those amendments, trial courts may, "in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed …." (§§ 12022.5, subd. (c), 12022.53, subd. (h).) In light of these changes in the law, the parties filed supplemental briefs addressing the propriety of a resentencing hearing to allow the trial court to consider exercising its discretion to strike one or more of defendant's firearm enhancements.

The parties agree Senate Bill 620 applies retroactively to all nonfinal judgments. Absent evidence to the contrary, it is presumed the Legislature intended an amended statute reducing the punishment for a criminal offense to apply retroactively to defendants whose judgments are not yet final on the statute's operative date. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Consistent with the case law on this issue, we accept the parties' position and will remand the matter for the trial court to consider whether to exercise its discretion under section 12022.5,

subdivision (c) and/or section 12022.53, subdivision (h). (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678–679.)

DISPOSITION

Count 5, possession of a firearm by a felon in violation of section 29800, subdivision (a)(1) is reversed for insufficient evidence. Count 6, carrying a loaded firearm in public as an active member of a criminal street gang in violation of section 25850, subdivision (c)(3) is also reversed for insufficient evidence. The matter is remanded to the trial court with directions to dismiss count 5, reduce count 6 to a misdemeanor violation of section 25850, subdivision (a) and conduct a new sentencing hearing. When defendant is resentenced, the trial court shall consider whether to exercise its discretion to strike any or all of the firearm enhancements pursuant to sections 12022.5, subdivision (c), and 12022.53, subdivision (h). In all other respects, the judgment is affirmed.

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PEÑA, J.

WE CONCUR:

HILL, P.J.

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DESANTOS, J.